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**IN THE
SUPREME COURT OF THE
UNITED STATES**

October Term, 1947.

No.

SAMUEL LEONARD BERENBEIM, PETITIONER,

v.

UNITED STATES OF AMERICA.

BEN SCHECHTER, PETITIONER,

v.

UNITED STATES OF AMERICA.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE TENTH CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.**

**BASIS ON WHICH IT IS CONTENDED THAT
THIS COURT HAS JURISDICTION.**

Jurisdiction exists by virtue of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (Chapter 229, 43 Stat. 936). The Court rendered its judgment on November 5, 1947 (R. 1050, 1051). Petitioners filed their application for extension of time within which to file their petition for rehearing on November 10, 1947, within the time provided by the rules of the Tenth Circuit Court of Appeals. On November 11, 1947, the Circuit Court extended the time for petitioners to file the petition for rehearing

until and including November 27, 1947 (R. 1051). On November 24, 1947, petitioners filed their petition for rehearing (R. 1057). Said petition was denied December 10, 1947 (R. 1059).

STATEMENT OF THE CASE.

Petitioners were indicted for conspiracy under the general conspiracy statute, Sec. 37 of the Criminal Code, 18 U.S.C.A. Sec. 88, to defraud the government and to violate the false claims statute, Sec. 35 of the Criminal Code, 18 U.S.C.A. Sec. 80.

Petitioner Berenbeim was the general agent in Colorado for the Ancient Order of United Workmen, hereinafter called the A.O.U.W. (R. 494). Petitioner Schechter was an insurance solicitor for the A.O.U.W. and for another insurance company (R. 497).

In order to understand the nature of the case, it is necessary to refer to certain provisions of the Soldiers and Sailors Civil Relief Act, hereinafter referred to as the Act (50 U.S.C.A. app. sec. 540 *et seq.*) which are set forth in the footnote hereto.*

*50 U.S.C.A. appendix, Section 540:

"As used in this article—

"(a) The term 'policy' shall include any contract of life insurance or policy on a life, endowment, or term plan, including any benefit in the nature of life insurance arising out of membership in any fraternal or beneficial association, which does not provide for the payment of any sum less than the face value thereof or for the payment of an additional amount as premiums if the insured engages in the military service of the United States as defined in section 101 of article I of this Act (section 511 of this Appendix) or which does not contain any limitation or restriction upon coverage relating to engagement in or pursuit of certain types of activities which a person might be required to engage in by virtue of his being in such military service, and (1) which is in force on a premium-paying basis at the time of application for benefits hereunder, and (2) which was made and a premium paid thereon before the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 (Oct. 6, 1942) or not less than thirty days before the date the insured entered into the military service.

"(c) The term 'insured' shall include any person in the military service of the United States as defined in section 101, article I of this Act [section 511 of this Appendix], whose life is insured under and who is the owner and holder of and has an interest in a policy as above defined."

50 U.S.C.A. App., Sec. 541:

"The benefits and privileges of this article shall apply to any insured, when such insured, or a person designated by him, or, in case the insured

The Act provided for the guarantee by the government of premiums on life insurance policies of members of the armed forces if the policy did not contain a "war-exclusion" clause (i.e., no restriction of coverage of the insured because of military service, and no increase in the premium because of such service), if it was in force on a premium paying basis at the time application was made for such guarantee, and if the contract of insurance was made, and a premium paid thereon not less than thirty days prior to the date the insured entered into military service (50 U.S.C.A. app. sec. 540).

The gist of the indictment (R. 14-53) is that petitioners did conspire to cause the Veterans Administration to guarantee premiums on policies issued by the A.O.U.W. which were not eligible for guarantee under the Act. More specifically, it was charged that petitioners did conspire and agree to fraudulently cause to be issued certain policies by the A.O.U.W. on the lives of certain persons who were about to enter or had entered into active duty with the military service of the United States, so as to make it appear that said policies had been in force on a premium-paying basis at the time of application for benefits under said Act, and had been made and a premium paid thereon not less than thirty days before the date the insured had entered into the

is outside the continental United States (excluding Alaska and the Panama Canal Zone), a beneficiary, shall make written application for protection under this article, unless the Administrator of Veterans' Affairs in passing upon such application as provided in this article shall find that the policy is not entitled to protection hereunder."

50 U.S.C.A. app., Sec. 546:

"Payment of premiums and interest thereon at the rate specified in section 405 hereof (section 545 of this Appendix) becoming due on a policy while protected under the provisions of this article is guaranteed by the United States, and if the amount so guaranteed is not paid to the insurer prior to the expiration of the period of insurance protection under this article, the amount then due shall be treated by the insurer as a policy loan on such policy, but if at the expiration of said period the cash surrender value is less than the amount then due, the policy shall then cease and terminate and the United States shall pay the insurer the difference between such amount and the cash surrender value. The amount paid by the United States to an insurer on account of applications approved under the provisions of this article, as amended, shall become a debt due to the United States by the insured on whose account payment was made and, notwithstanding any other Act, such amount may be collected either by deduction from any amount due said insured by the United States or as otherwise authorized by law. Oct. 17, 1940, c. 888, Article 406, 54 Stat. 1184, as amended Oct. 6, 1942, c. 581, Article 13, 56 Stat. 775."

military service of the United States, whereas, in fact (the indictment charged), the policies had not been issued nor a premium paid thereon more than thirty days prior to the entry of the insured into military service. The procedure whereby a soldier in the military service obtained the protection of the Act was as follows:

He would send to the Veterans Administration an "Application for Benefits." Copies of these applications appear in the Record. (R. 777, 793). The purpose of this application was to notify the Veterans Administration that the soldier desired to bring his policy under the protection of the Act. Blank forms (known as form 380) were furnished by the Veterans Administration to be filled in by the soldier showing his date of induction, branch of service, effective date of the insurance, the date on which the last premium was paid, the number of the policy, and other pertinent data. The application also contained a statement to the effect that the soldier agreed to any modification of the terms of the policy necessary to bring it under the Act, and an agreement that the "United States shall be protected in the amount of any premiums and interest guaranteed." After the Application for Benefits was received by the Veterans Administration, it sent to the insurance carrier a blank form to be filled in, called "Report by Insurer" (form 381). Copies of these reports appear in the Record (R. 780, 812). The purpose of this report by the insurer was to supply the Veterans Administration with the necessary information about the particular insurance policy so it could be determined whether or not the policy was eligible for protection under the Act. The report by insurer called for the following information, *inter alia*: (1) The effective date of the insurance; (2) the due date of last premium paid; (3) the date on which the contract was made and the first premium paid.

These "reports by insurer" were in every case filled out by the home office of the A. O. U. W. and petitioners had nothing to do with them (R. 118, 505).

The reports submitted by the A.O.U.W. in every case reported the effective date of the insurance, the date on which the contract was made, and the date on which the

first premium was paid as the first day of the month in which the policy was written (See tabulation, pages 33-37 of this brief).

The instant case stems from the circumstance that it had been the consistent and uniform practice of the A.O. U.W. since 1868 to date all of its policies on the first of the month, regardless of the actual date of the application or formal execution (R. 167-168).

For example, if an application for insurance was made on the tenth of a given month, the policy itself would be ante-dated so it would appear therefrom to have been issued on the first of the month (R. 167-168). The government based the prosecution on the fact that *in some cases the application for insurance was made less than thirty days before the entry of the insured into military service, although the record of the A.O.U.W., and the policy itself showed that it was in effect for more than thirty days prior to the entry of the insured into service.* The apparent discrepancy was due to the sixty-eight year old practice of the A.O.U.W. of ante-dating its policies to the first day of the month in which they were issued. The petitioners were advised by the A.O.U.W. in a written communication that this practice had been in force and effect and could be followed in respect to policies issued to persons about to enlist in the military service (R. 100-101).

Policies of the A.O.U.W. did not contain a war-exclusion clause and were therefore eligible for protection under the Act (R. 495) if issued and a premium paid thereon at least thirty days before induction of the soldier into the service. The Record is voluminous, but this is largely due to the fact that the charge of conspiracy is one in which great latitude is allowed, and the evidence, particularly the exhibits, was cumulative. The government called as witnesses sixteen veterans who had obtained insurance from the A.O.U.W. through the solicitation of the petitioner Schechter and other solicitors.

They had made application for this insurance shortly before entering the military service. At the time they made application for insurance they also signed form 380,

the application for benefits under the Act, which was left with the agent with instructions to fill in their date of induction, and other details as to their rank and branch of service (R. 579).

After induction, the soldier would notify the agent of his rank, serial number, branch of service, and date of induction, and this information would be inserted by the agent in the application for benefits, one copy of which was sent to the Veterans Administration, and another to the A.O.U.W. (R. 579). All of this was done under express instructions from the A.O.U.W. (R. 504, 539 and 540).

Some of the soldiers also testified that the solicitor told them that the policy would not cost them anything; (R. 257, 305, and 311) that after the expiration of two years after the war the soldiers could keep the policies or let them lapse, and they would not be obligated to the government for the advance of premiums (R. 257, 311, 320, and 327).

It also appeared from the evidence that in some instance there was no medical examination as required by the rules of the A.O.U.W., but a medical certificate was nevertheless executed by some doctor who did not see the applicant (R. 259, 376). At the conclusion of the government's case, petitioners moved for a verdict of acquittal (R. 485-488) which motion was repeated at the conclusion of all the evidence and denied (R. 726-727).

The petitioners also requested an appropriate instruction on good faith. This instruction was as follows (R. 735):

"If you believe from the evidence, or if you entertain a reasonable doubt upon the question that the defendants acted in good faith in the honest belief that they were doing what they had a legal right to do, you must acquit such defendants, even though the effect of what the defendants actually did was illegal."

The Court refused such instruction, and the only instruction on good faith given by the Court was, "Also good faith and honest belief is a defense, *if you so find, after you have considered all the evidence*" (R. 759, 760). (Italics added).

REASONS RELIED ON FOR ALLOWANCE OF CERTIORARI.

1. The Circuit Court decided an important question of Federal Law, involving the construction of the Soldiers and Sailors Civil Relief Act (50 U.S.C.A. Appendix, Section 540, *et seq.*) which has not been, but should be, settled by this Court. The lower court held that insurance policies dated more than thirty days prior to a soldier's entry into Military service were not eligible for protection under the Act if they had been physically executed less than 30 days prior to such entry. This is contrary to well-settled principles of statutory construction, and it is important that there be an authoritative construction of the Act.

2. The Circuit Court decided a federal question in a manner in conflict with the applicable decisions of this Court in that it held that the controlling date of a life insurance policy for determining its eligibility for protection under the Act was the date on which it is physically written rather than the date recited in the policy itself. This Court has held in the cases of *Mutual Life Ins. Co. v. Hurni Co.* 263 U. S. 167, and *McMaster v. New York Life Ins. Co.* 183 U. S. 25, that the controlling and effective date of a life insurance policy is not the date on which it is physically executed, but rather the date recited in the policy.

3. The decision of the Circuit Court is in conflict with the decision of another Circuit Court, to-wit; the decision of the Circuit Court for the 2nd Circuit in the case of *Terry v. United States*, 131 F. (2d) 40. The Terry case decided that transactions between a private citizen and a private corporation, previous to a transaction with the government, cannot be made the basis of a charge to defraud the government and that the false claims statute (18 U.S.C.A. 80) did not embrace transactions between private parties. The Circuit Court in the instant case, however, held that it was proper in a prosecution under the false claims statute to introduce evidence intended to show fraud practiced on private individuals prior to, and independent of, any transaction with the government.

4. The Circuit Court has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision for the reason that the Circuit Court sustained a conviction of petitioners for a wrong committed by others, in this—if there was any fraud on the government, or purpose or intent to defraud the government, it was through the implementation of written questionnaires prepared by the Veterans Administration and answered by the A.O.U.W., over which petitioners had no control and in which they took no part, directly or indirectly.

5. The Circuit Court has decided an important question of federal law which has not been, but should be, decided by this Court, to-wit: whether a conviction for a conspiracy to defraud the government (18 U.S.C.A. 88) can be sustained by evidence which shows fraud against private individuals only. Assuming that the evidence produced by the Government showed fraud on the part of petitioners, such fraud was not practiced on the government, but upon private individuals and a private corporation. So petitioners were convicted of a conspiracy to defraud the government by evidence which at the most showed fraud against private parties.

6. The Circuit Court has decided an important matter of federal law in conflict with the decision of another Circuit Court, and of this Court, to-wit: the decision in *United States ex rel Brensilber et al v. Bausch & Lomb Optical Co. et al* 131 F. (2d) 545 (CCA 2), affirmed by this Court by an equally divided Court, 320 U. S. 711; in which case it was held that wrongdoing by private citizens concerning which no misrepresentation has been made to the government, is not covered by the false claims statute. The government relied heavily on evidence that petitioners had caused insurance policies to be written by a fraternal insurance society without submitting the applicants to medical examination. There was no representation to the Veterans Administration that there had been such examinations, and no requirement by the Veterans Administration that there should be medical examinations. So the conviction of petitioners is squarely contrary to the decision in *Bausch & Lomb, supra*.

7. The Circuit Court has decided an important question of federal law which has not, but should be, passed upon by this Court: Whether under the Rules of Criminal Procedure, it is necessary for a defendant tendering an instruction properly stating the law on the matter in issue to also specifically object to an erroneous instruction given by the Court. Petitioners presented a proper instruction as to good faith (#21, R. 735). The trial court refused such instruction and gave an erroneous instruction which placed upon petitioners the burden of proving good faith (R. 759, 760). The Circuit Court declined to consider the matter on the ground that the instruction had not been objected to. The question is thus presented whether under Rule 51 of the Rules of Criminal Procedure it is necessary to object to an erroneous instruction when a correct instruction has been tendered on the issue.

8. The Circuit Court so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision in that the court sustained a conviction on a theory that was expressly rejected by the ruling of the District Court. The trial court instructed the jury that the practice of the A.O.U.W of ante-dating its policies was not evidence of fraud, whereas the Circuit Court held to the contrary, and therefore necessarily sustained a conviction on a theory that was not submitted to the jury.

QUESTIONS PRESENTED.

1. Where a fraternal organization has a long-standing practice of ante-dating its policies to the first of the month, regardless of when the policy is physically issued, and reports to the Veterans Administration that such policies were issued on the first of the month, does such report constitute a false or fraudulent statement under the false claims statute (18 U.S.C.A. Sec. 80)?

2. Assuming such reports to be fraudulent within the meaning of 18 U.S.C.A. 80, could insurance agents who had nothing to do with the making of such reports be held criminally liable for statements contained in them?

3. In a prosecution for a conspiracy to make false statements to the government and for conspiracy to defraud the government, can evidence be introduced to show a fraud against a private citizen only?

4. Where a correct instruction is properly requested on a certain issue, and a manifestly incorrect instruction is given, is it necessary under the Rules of Criminal Procedure for the party tendering the correct instruction to specifically except to the incorrect one given by the Court?

5. Where there is conflict between the rulings of the District Court and the Circuit Court of Appeals on the vital question in the case, can a conviction be sustained? More specifically, can a conviction be sustained by an appellate Court on a theory not submitted to the jury and expressly repudiated by the trial court?

6. If all statements in a report to the government are true at the time it is submitted to a governmental agency for consideration, does the fact that at the time it was signed it contained incorrect statements as of that date make it a false statement within the meaning of 18 U.S.C.A. 80?

7. Does the date on which a contract of insurance is made within the meaning of the Soldiers and Sailors Civil Relief Act (50 U.S.C.A. App. Sec. 540) mean the date recited in the policy, or the date on which the policy is physically executed?

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals Erred:

1. In affirming the conviction of petitioners.
2. In holding that the policies issued by the A.O.U.W. were not entitled to the protection of the Soldiers and Sailors Civil Relief Act.
3. In holding that evidence of petitioners' alleged misrepresentations to prospective soldiers was competent to show fraud against the government.
4. In holding that evidence that petitioners had caused

the A.O.U.W. to issue policies without medical examinations was competent to show fraud against the government.

5. In holding that petitioners were responsible for alleged misrepresentations made by the A.O.U.W. to the government.

6. In holding that there had been fraud or misrepresentation practiced upon the Veterans Administration.

7. In holding that there was sufficient evidence to show a conspiracy.

8. In holding that there was sufficient evidence to connect the petitioner Berenbeim with the alleged conspiracy.

9. In holding that there was not a fatal variance between the conspiracy charged and the conspiracy which the government attempted to prove.

10. In holding that petitioners had not made proper objection to the instruction of the trial court which placed upon petitioners the burden of proving their good faith.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

We incorporate herein the statement of the case contained in the petition for certiorari.

I.

The Circuit Court Decided an Important Question of Federal Law Involving the Construction of the Soldiers and Sailors Civil Relief Act (50 U.S.C.A. App. Sec. 540, et seq.) Which Has Not Been, but Should Be Settled by This Court.

The Circuit court held that in determining eligibility of an insurance policy for protection under the guarantee provisions of the Soldiers and Sailors Civil Relief Act, hereinafter called the "Act," the controlling date of the policy is the date on which it is physically executed, rather than the effective date recited in the policy itself. It is submitted, that this is an important matter of federal law involving the construction of a United States statute which

should be settled by this Court. The point involved here can best be developed by considering a concrete case in the evidence.

The witness Bernard Reiff testified that he was solicited to take an A.O.U.W. policy by petitioner Schechter in February, or the early part of March, 1943 (R. 382).

He signed an application for insurance which was dated February 3, 1943. (Plaintiff's Ex. 53-b, R. 1013). This application was received by the home office of the A.O.U.W. March 1, 1943 (R. 1013). The home office reported to the Veterans Administration that it had issued a policy on the life of Reiff, the effective date of which was February 1, 1943 (plaintiff's exhibit 53-f, R. 1024) and that the insurance contract was made and the first premium paid thereon on February 1, 1943 (R. 1024).

Of course, it was physically impossible that the policy could have been written on February 1 and a premium paid on that date because that was before the insured had even signed his application for insurance. Reiff was inducted into the army on April 5 (R. 383) and his application for benefits was dated April 6 (R. 1023). The date of his induction was not less than thirty days after the date of the contract and the date on which the first premium was paid according to the report of the insurer. If the practice of the A.O.U.W. of ante-dating policies had been inaugurated shortly before or at the time of the issuance of these war policies, it might be argued that it was a scheme or trick to bring the policy within the provisions of the law, but there is no question in this case that this practice had been followed as a matter of convenience ever since the inception of the company (R. 167, 168). Indeed, the Court in its charge to the jury stated (R. 753-754):

"The evidence in this case is that the long-standing custom and practice of the Ancient Order of United Workmen was to date the beneficiary certificates which it issued on the first day of the month in which the application is received, unless the applicant requested otherwise. Under these circumstances the effective date of the insurance for the purpose

of determining its availability for guaranty under the Soldiers and Sailors Civil Relief Act, is the first of the month."

The Court of Appeals, however, took an opposite view. That court said:

"After the policy had been issued, the defendant who had solicited the insurance filled out or caused to be filled out the application for benefits under the Act previously signed in blank and left with such defendant. One question asked in the application was the due date of the last premium paid on the policy, and the date called for in that question was given as the first day of the month in which the policy was written. Another question was the date on which the next premium would be due and payable, and the date called for in that instance was given as the first day of the month following the month given in response to the previous question. *Relying on these answers, the company gave like answers to the questions in the report which it submitted.* Filled out in that manner, the application and the report in many instances without foundation of fact showed that the policy had been issued on a premium-paying basis and a premium paid thereon more than thirty days prior to the entry of the insured into active duty in the military service. Relying upon the statements made in the applications and in the reports submitted in that manner, the Veterans Administration approved many of the applications, the company accounted to Berenbeim for his commission, Berenbeim made payments to Mankoff and Schechter, and Schechter in turn settled with Marie Stoeffler." (R. 1045-1046). (Italics added.)

The Circuit Court recognized the practice of the A.O. U.W. that had been carried on for many years, nevertheless it held in substance that the report made by the A.O.U.W. "without foundation of fact showed that the policy had been issued on a premium-paying basis and a premium paid thereon more than thirty days prior to the entry of the insured into active duty in the military service." (R. 1045).

This it will be remembered was the very gist of the indictment. It is submitted that the Circuit Court in holding that these policies were not eligible for protection under the Act erred in its construction of the statute involved. The proper construction of the Soldiers and Sailors Civil Relief Act is a matter of vital importance, and it is respectfully submitted that for this reason certiorari should be granted.

II.

The Circuit Court Decided a Federal Question in a Manner in Conflict with the Applicable Decisions of This Court in That It Held That the Controlling Date of a Life Insurance Policy for Determining its Eligibility for Protection Under the Act Was the Date on Which It Is Physically Written Rather than the Date Recited in the Policy Itself.

The Court did not give to the word "date" its ordinary accepted meaning as determined by this Court and other Courts. In *Mutual Life Insurance Company of New York v. Hurni Packing Company*, 263 U. S. 167, 174, this Court held:

"The word 'date' is used frequently to designate the actual time when an event takes place, but, as applied to written instruments, its primary signification is the time specified therein. Indeed this is the meaning which its derivation (*datus* given) most naturally suggests. In *Bement & Dougherty v. Trenton Locomotive & Co.*, 32 N.J.L. 513, 515, 516, it is said: 'The primary signification of the word *date*, is not time in the abstract, nor time taken absolutely, but as its derivation plainly indicates, time 'given' or specified, time in some way ascertained and fixed; this is the sense in which the word is commonly used. When we speak of the date of a deed, we do not mean the time when it was actually executed, but the time of its execution, as given or stated in the deed itself. The date on an item, or of a charge in a book account, is not necessarily the time when the article charged was in fact, furnished, but simply the time given

or set down in the account, in connection with such charge."

To the same effect, see *McMaster v. New York Life Ins. Co.*, 183 U. S. 25. This Court has held that " * * * words of statutes * * * should be interpreted where possible in their ordinary everyday sense." *Crane v. Commissioner of Internal Revenue* U. S.; 67 S. Ct. 1047, 1051. Certainly the date of an insurance policy is generally understood to be that date expressed in the policy itself, and not the date on which it may have been physically executed. The very purpose of dating written instruments is to settle all questions as to when they were actually and physically made or executed.

The Circuit Court held that there was no foundation of fact in the insurer's report which gave the dates of insurance policies as the dates recited in the policies, rather than the dates on which they were physically issued. It is submitted that such decision is contrary to decisions of this Court above referred to, and certiorari should therefore be granted.

III.

The Decision of the Circuit Court Is in Conflict with the Decision of Another Circuit Court, To-Wit, the Decision of the Circuit Court for the 2nd Circuit in the Case of Terry v. United States, 131 F. (2d) 40.

In the Terry case the Court construed the words "in a matter within the jurisdiction of any agency of the United States" of the false claims statute (18 U.S.C.A. Sec. 80) as excluding from the provisions of that statute false statements made to a loan company by the defendant with the intention that the loan applied for was to be guaranteed by the Federal Housing Authority.

The Circuit Court in that case held that the making of loans was a local business and that federal criminal jurisdiction was not extended by the false claims statute to cover such transactions. Among other things the Court said:

"On the other hand, the business of making small loans of the kind which may become insurable under the Act is, and has always been commonly and generally carried on in all the states, and in the aggregate of transactions it constitutes a very considerable business of local character in each of the states. All of the states have penal laws against the perpetration of fraud in obtaining such loans. As the relevant part of the plan of the Housing Act leaves all of the actual business of making, securing and collecting the loans which may be brought within its purview to be carried on in the several states by private persons (doubtless in large part by the same persons theretofore engaged in that same general business), it is not self-evident that Congress would choose (even if it could) to extend the federal criminal jurisdiction to all of that business" (131 F. (2) 40, 43). (Italics ours.)

It must be presumed that Congress in enacting the statute for the protection of policies of men in military service did not intend to interfere with the ordinary operations of insurance companies.

The lower court held in substance and effect that Congress by the Act intended to direct and control the operations of the A.O.U.W. and all other insurance companies. This decision, it is submitted, is in conflict with the decision in the Terry case. On this account a writ of certiorari should be granted. There is this important difference to be noted between the Terry case and the instant case. In the Terry case, the certificate was false, whereas, in the case at bar, the insurer's report reflected the common ordinary course of business of the A.O.U.W. that had been pursued uninterruptedly since 1868.

IV.

The Circuit Court Has so Far Sanctioned a Departure from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of the Supreme Court's Power of Supervision for the Reason That the Circuit Court Sustained a

Conviction of Petitioners for a Wrong Committed by Others.

Petitioners were found guilty of something which the record establishes was done not by them, but by the home office of the A.O.U.W. It should be remembered that the all-important "Report by the Insurer" was prepared and sent to the Veterans Administration not by petitioners, but by the home office of the A.O.U.W. (R. 118).

Any misrepresentations or false claims made to the government were necessarily transmitted by means of this report.

Yet petitioners never saw one single copy of such report (R. 505). So, it is manifest that petitioners are being punished for acts of the officers of the A.O.U.W., of which they were completely unaware and over which they had no control. The Circuit Court seemed to think that the false reports were based on information supplied by petitioners to the A.O.U.W. The Record proves conclusively the opposite. Attached to this brief is a tabulation of data concerning the issuance of policies by the A.O.U.W. which were relied on by the government to prove its charge.

A study of this tabulation shows conclusively that the information given to the Veterans Administration via the insurer's report by the A.O.U.W. *was not based on any information it received from petitioners.* On the contrary, the reports made by the A.O.U.W. were at variance with the information they received from petitioners.

A cursory inspection of this tabulation will show that the home office invariably reported that each policy was issued on the first of the month regardless of the date of the application for insurance, and regardless of the date on which such application was received by the Home Office. Take, for example, the case of Charles Donald Lind, tabulated on page 35 of this brief. His application for insurance was dated February 7. It was not received by the home office until March 1. *But the A.O.U.W. reported to the Veterans Administration that the contract was made and a premium paid thereon February 1.*

If this was a false report, it was solely the responsibility of the A.O.U.W. It was admitted at the trial that petitioner had nothing to do with the insurer's report (R. 118).

The Circuit Court ruled that the answers given in the insurer's report as to the effective date of the policy, etc., were based upon answers given in the application for benefits, which were filled out by the petitioners. This is obviously incorrect. The application for benefits, form 380, was not and could not in the nature of things be filled out until the policy was issued (R. 579, 580). Indeed, the Court recognizes that in a previous part of the opinion. It was necessary to insert in the application for benefits the number of the policy. Manifestly, this could not be done until the policy was issued. The date of the policy and the due-date of the premium appeared in the policy. As has already been pointed out, these dates had nothing to do with the date of the application for insurance, but were based upon the practice of dating the policies on the first of the month. The effective date of the policy and the date the premium was paid as it appears in the insurer's report were not based on anything that the petitioners did or could do. The contrary is the truth, i.e., that the effective date of the policy as given in the application for benefits was based upon information from the insurer as set forth in the policy.

The insurer's report to the Veterans Administration was of controlling importance in this case. The undisputed evidence is that the petitioners never even saw a sample form of the insurer's report until the trial (R. 505). This report was required by the Veterans Administration and no policy could be guaranteed without such a report. If there were any false or misleading statements in the insurer's report, they could not possibly be imputed to these petitioners; it was the act and deed of the A.O.U.W., and was wholly beyond the control of the petitioners. But the Circuit Court held petitioners guilty because of statements made by the A.O.U.W, statements of which petitioners were completely unaware, and with which petitioners had nothing whatsoever to do.

It is hardly necessary to say that to convict one for

the wrong done by another is in violation of fundamental justice, and that, therefore, certiorari should be granted on that account.

V.

The Circuit Court Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Decided by This Court, to-wit, Whether a Conviction for a Conspiracy to Defraud the Government (18 U.S.C.A. 88) Can Be Sustained by Evidence Intended to Show Fraud Against Private Individuals Only.

In this case evidence was introduced designed to show that the soldiers insured were in some way victimized by the petitioners. Some of these soldiers testified that the petitioner Schechter represented to them that if they took out these policies the premiums would be guaranteed and they would be under no obligation to the government for any advances that the government made and that the policies would cost them nothing (R. 257, 311, 320, 327). The most that can be argued from this evidence is that petitioner Schechter stated his belief that the government would not attempt to force the collection of any premiums that it had paid.

The petitioners produced in evidence a letter from Senator (then Congressman) Sparkman, a member of the military affairs committee, which indicated that the government would not press the veteran for reimbursement for any premiums advanced (R. 391-392):

“Dear Mr. Gelt:

“I have your letter of January 29 following the discussion that we had in my office on Saturday with reference to the last sentence of Section 406 of the Soldiers and Sailors Civil Relief Act of 1940 as amended in 1942 relating to the debt provisions under which it may be construed that a veteran returning from active service in the armed forces of the United States could find himself in debt to the Government in the event circumstances required

him to drop the commercial insurance protected under the provisions of Article 1 of the Act.

"As you know [when] the House passed the bill it provided that such excess payment would not be a debt against the citizen but that in conference this House provision was stricken and the Senate language was retained.

"I was a member of the conference committee. Representatives of the Veterans Administration appeared before the conference committee and assured us that even though the law should provide that such excess payments would be a debt against the individual, it would not be the policy of the Veterans Administration to harass ex-servicemen by suits or claims. It was upon this assurance that the conferees finally agreed to leave the language in the law.

"The argument is sometimes made that this will enable the Government to withhold some of the pay due the serviceman at time of discharge or to withhold muster-out pay. This is not true. As a matter of fact, under the law the excess payment of commercial insurance policies cannot become a debt against the individual for two years after his discharge from the service, that being the length of time given by him by the statute to refinance his insurance policies. By that time he will have received all pay and all muster-out pay.

"For my part I, of course, expect the Veterans Administration to carry out their assurance. If it should ever become evident that such was not to be done, I feel confident that Congress would quickly amend the law.

Sincerely,

John Sparkman."

The petitioners also received a copy of a letter from the head of the Veterans Administration, which is as follows (R. 1030, 1031):

"Honorable Edwin C. Johnson
United States Senate
Washington, D. C.
My dear Senator Johnson:

"Reference is made to your letter of February 25, 1943, transmitting a letter which you have received from Mr. A. A. Snyder of Denver, Colorado, who invites attention to certain provisions in Article IV of the Soldiers' and Sailors' Civil Relief Act.

"Mr. Snyder questions whether the present law will result in loss to insureds of policies which have been placed under the protection of Article IV because of the inability of such insured to repay, or otherwise finance, the indebtedness placed against their policies within the prescribed two years after separation from active military service and cites a hypothetical case.

"Under the original Soldiers' and Sailors' Civil Relief Act of 1940 failure of an insured to repay premiums guaranteed and interest thereon within one year after separation from military service resulted in the lapse of the policy, notwithstanding that the cash value of the policy might be sufficient to cover the indebtedness. In recognition of the need for greater liberality in this respect the Amendment of Article IV, approved October 6, 1942, extended the time allowed for repayment of premiums to two years after separation from military service and provided for termination of the policy only if premiums then due remained unpaid and if the cash surrender value was less than the amount then due.

"The cash surrender values of policies having guaranteed values increase during the period of protection. Annual dividends are also available as credit to participating policies during the period of protection. Premiums are guaranteed by the United States at an annual rate resulting in a savings to those insured whose policies provide for payment of premiums at a weekly, monthly, quarterly, or semi-an-

nual premium rate. Thus all available credits and discounts are utilized for the benefit of the insured.

“By providing under Section 406 of Article IV, as amended, that the amount guaranteed by the United States and not repaid by the insured be treated by the insurer as a policy loan on the policy, it was believed that a large percentage of insurance protection would be conserved for those policyholders who though unable to repay the full amount of their indebtedness before the period of protection had expired would, by having the indebtedness established as a policy loan, then be able to pay currently due premiums and continue the insurance.

“Your correspondent’s letter of February 23, 1943, with enclosure, is returned as requested.

Sincerely yours,

Frank T. Hines,
Administrator.”

The fraud denounced in the statute involved, 18 U.S. C.A., Section 88, implies deceit and moral fraud. In *United States v. Brown*, 79 F. (2d) 321, 325 (CCA 2), the Court speaking through Judge L. Hand says:

“The crime was deceit, and we agree with the Eighth Circuit that the liability runs *pari passu* with civil liability. *Foshay v. United States*, 68 F. (2d) 205, 211 (CCA 8). The Supreme Court has not indeed said so expressly, but that seems to us to be the pre-supposition of *Durland v. U. S.* 161 U. S. 306, 16 S. Ct. 508, 40 L. Ed. 709, and *U. S. v. Comyns*, 248 U. S. 349, 39 S. Ct. 98, 63 L. Ed. 287; and we have ourselves so treated it. *U. S. v. Rowe*, 56 F. (2d) 747 (CCA 2); *Pelz v. U. S.* 54 F. (2d) 1001 (CCA 2). Cf. *Harrison v. U. S.* 200 F. 662, 665 (CCA 6). It was therefore necessary for the prosecution to allege and prove utterances about existing facts which were untrue and known to be so.”

Evidence was offered to show that the A.O.U.W. had paid out Thirty-three thousand dollars (\$33,000) as bene-

fits upon policies guaranteed under the Act (R. 93, 94). It was also shown that a death loss was paid under one of the policies sold by one of the convicted agents (R. 631). At the time the petitioners solicited the prospective soldiers to take insurance, neither they nor anyone else knew whether the soldier would live or die. Manifestly, the question of fraud must be determined in the light of what the parties knew at the time the insurance was taken out. If there was no fraud in cases where the beneficiaries collected under the policy, there could be no fraud in cases where the soldiers survived.

In the report of the Committee on Military affairs of the House of October 6, 1942 (House Report No. 2198), the committee described insurance policies that had no war restriction clause as having "an enhanced and peculiar value" to the dependents of persons in hazardous military service (50 U.S.C.A. App. page 110).

That this evidence of alleged overreaching the soldier was most prejudicial cannot be gainsaid. Any suggestion that a soldier who had served his country had been overreached or taken advantage of was bound to induce strong resentment with an ordinary jury. The cumulative effect of sixteen soldiers testifying along the same line justifies the conclusion that petitioners were convicted, not because of fraud against the government, but because of fraud against the soldier, a charge that was not made and not proved. How can it be reasonably or justly said that a soldier has been defrauded either actually or potentially when he obtains a policy that had an "enhanced and peculiar value" for his dependents?

The representations made by insurance salesmen for the A.O.U.W. to the soldiers to the effect that they could have the benefits of the Act and then permit the policy to lapse after severance from service was not at variance with the Act. This is shown by the legislative history of the Act, as well as the letters from Senator Sparkman and Senator Hines, previously referred to. In the Senate an amendment was made to the definition of the term "policy" which would have made the Act applicable to a contract of life insurance:

“(1) which is in force on a premium-paying basis at the time of application for benefits hereunder, (2) has also been in force on a premium-paying basis for one year or more prior to the date insured entered such active service, or one year or more prior to the date of enactment of this article, as amended, whichever is the later date, and (3) which will have a cash surrender value at the expiration of one year from the due date of the first annual premium guaranteed under the provisions of this Act, equal to or greater than one annual premium required by the policy.”

(Senate Report No. 1558, p. 6)

In commenting upon this amendment the Senate Report said (page 8):

“The amendment will restrict protection to an insurance policy issued on a level premium life or endowment plan which has been in force 1 year or more prior to the date of the proposed amendment or the date on which the insured entered on active duty with the military or naval forces, whichever is the later date, and which will have a cash surrender value at the expiration of 1 year from the due date of the first premium guaranteed, equal to or greater than one annual premium required under the policy. This will exclude a policy issued on a term plan or a policy arising out of a fraternal or beneficial association which has no cash surrender value, *and will bar protection of a policy which the insured applied for shortly before entering the military or naval service with the intention of having the Government pay for protection during his period of active service which he does not intend to carry thereafter.*” (Italics added.)

When the bill went to Conference the Senate Amendment was rejected, and the bill finally became law without the Senate Amendment. So the restriction which would have been imposed by the Senate Amendment was rejected and policies “which the insured applied for shortly before entering the military or naval service” were under the protection of the Act. The Conference Report contains the following statement of the Management on the part of the House (Conference Report, House Report No. 2481, p. 5):

“Under the House Bill, a contract of insurance upon which premium has been paid before the date of approval of the act or not less than 30 days before entry into the military service, regardless of the cash value of such policy, might be covered. Under the Senate amendment, the policy must have been in force at least 1 year prior to the date of active service or prior to the date of enactment of the act and must have a cash surrender value of at least one annual premium. This would operate to require a policy to be 3 or 4 years old before it could receive the protection of the act because many policies would not have a cash surrender value equal to one annual premium before the expiration of such time. The conference agreement retains the House provisions.”

It was perfectly proper therefore for persons intending to enter the military service to take out this insurance and have the government guarantee the premiums with the express intent of letting the policies lapse after completion of service. Such practice would have been precluded by the Senate Amendment, but this amendment was specifically rejected.

When Congress turned down the Senate amendment which was designed expressly to prevent the taking out of a policy prior to entry into military service with the intention of dropping it upon termination of such service, Congress necessarily put its stamp of approval on that very practice. The opinion of the Circuit Court of Appeals completely ignores this interpretation of the Act which clearly appears from its legislative history.

There was also evidence introduced over petitioners' objection tending to show that some of them had procured false medical certificates, that is, certificates by a doctor who had never examined the applicant (R. 193, 194). All of these soldiers had been thoroughly examined by army doctors or physicians and passed as fit for military service. Indeed, the indictment so charges (R. 17-18). The Veterans Administration was not concerned with whether these soldiers had medical examination. The A.O.U.W. issued policies up to three thousand dollars without medical examination, and these policies were guaranteed by the Veterans Ad-

ministration (R. 663-664). The Veterans Administration, acting under the authority conferred on it by an Act of Congress, prepared forms 380 and 381. Clearly, these questionnaires were designed to elicit the necessary information which would enable the Veterans Administration to determine whether a policy was eligible for protection. No inquiry was made as to whether there had been a medical examination. This would seem to be conclusive that in the judgment of the Administration such examination was unnecessary in view of the conceded fact that the soldiers had previously been certified as mentally and physically fit by competent army doctors. It would also seem that where one has truthfully answered the questions submitted by the governmental agency, he has performed his duty.

VI.

The Circuit Court Has Decided an Important Matter of Federal Law in Conflict With the Decision of Another Circuit Court, and of This Court, to-wit: The Decision in United States Ex Rel. Brensilber et al. v. Bausch & Lomb Optical Co. et al., 131 F. (2d) 545 (CCA 2) Affirmed by This Court by an Equally Divided Court, in Which Case It Was Held That Wrongdoing by Private Citizens Concerning Which No Misrepresentation Has Been Made to the Government Is Not Covered by the False Claims Statute.

There was no representation to the Government as to medical examinations. As has already been pointed out, the forms prepared by the Veterans Administration to be filled in by the insurer did not call for any such information. Even though it be assumed for the sake of argument that there was some wrong committed in not having the soldiers examined, since there was no representation to the Veterans Administration concerning this matter, clearly there was no misrepresentation to or fraud practiced upon the government. This is squarely held in the case of *United States ex rel. Brensilber et al. v. Bausch & Lomb Optical Co. et al.*, 131 F. (2d) 545 (CCA 2), which was a prosecution under the false claims statute. The defendants had obtained a contract from the government by rigging bids and suppressing competition between prospective bidders.

The government would not have entered into the contract if it had been known that there was manipulation among the bidders. The court on page 546 said:

“We assume, that is, that if the claimant has once procured a contract by fraud, any claims he may thereafter present are ‘fraudulent,’ whether or not they fall within its terms. That seems to have been the understanding of the Ninth Circuit in *Dinnick v. United States*, 116 F. 825, and of the Third Circuit in *United States ex rel. Marcus v. Hess*, 127 F. (2d) 233. Nevertheless, the statute certainly makes fraud of some sort the basis of the liability, and uses the word in its accepted sense of deceit, as appears from the juxtaposition of the three adjectives, ‘false,’ ‘fictitious’ and ‘fraudulent.’ Therefore, although by hypothesis it would be enough that a claimant secured his contract by deceit, deceit is a *sine qua non*: it will not serve that he secured it by any other kind of wrong. The distinction is well illustrated in *United States v. Hess*, *supra*. The bidders had there all agreed that the defendant, one of their number, should get the contract; he was to put in a bid in an amount agreed to by all, which the others were to top so that their bids would inevitably be rejected. To put in such bids was a deceit, for the bidders intended that the bids should not be accepted, although by the act of bidding they represented that they hoped to succeed. The defendant, being a party to this deceit, which was the means by which he procured his contract, was himself guilty of fraud. In the case at bar, the contracts between Bausch & Lomb and Carl Zeiss of Jena (strictly only the second one is relevant) unlawfully gave Bausch & Lomb an advantage without which, we will assume—though that is not certain—they would not have secured their contracts with the United States. *That was a wrong, but it was not a ‘fraud’ unless Bausch & Lomb represented at some stage of the negotiations that they had not secured an unlawful monopoly of the market.* Plainly a bidder who bids for a contract makes no representation, express or implied, as to the reasons which have led

him or enabled him to put in his bid. He does indeed represent that he can perform, but he does not represent that there is an open market, or that his bid is 'normal' or 'reasonable,' or 'competitive.' If he has been guilty of unlawful conduct in eliminating competitors, he can be called to account as Bausch & Lomb have been, but not because by bidding he has said anything about competition.' " (Italics ours.)

The decision of the Circuit Court in the present case is in conflict with the decision of the Circuit Court of the second circuit and of this Court in *United States ex rel. Brensilber et al. v. Bausch & Lomb Optical Co., et al., supra*, which was affirmed by this Court by an equally divided Court (320 U. S. 711) and, therefore, certiorari should be granted.

At the trial of this case it was strongly urged by the government that the application for benefits contained false statements because at the time the prospective soldier signed such application he was not actually in the military service. What actually happened was this: At the time the prospective soldier made application for his insurance, he also signed a blank form for application for benefits under the Act and left it with the insurance solicitor with the understanding that the same was to be completed by the solicitor and forwarded to the Veterans Administration after he had entered the military service. In order to enable the solicitor to fill out the application, the insured notified him after he was inducted and gave him his date of induction, his army serial number, and his branch of service (R. 220, 579). The solicitor would then put this information in the application, together with the number of the policy, its effective date, and the due date of the last premium, and send it to the Veterans Administration. There is no question that at the time the application was received by the Veterans Administration the insured was in the army, and that it was the intention of both the insured and the solicitor not to forward it to the Veterans Administration until after he had been inducted (R. 579). The truth or falsity of the statement contained in the application for benefits must be determined in the light of the facts existing when said document was brought to the attention of the Veterans Administration for official action. See *Reass v. United States*, 99

F. (2d) 752; and *Lightfoot v. State*, 128 Tex. Cr. Rep. 281, 80 S. W. (2d) 984. Before it was transmitted to the Veterans Administration, it was a mere piece of paper.

It could only lead to action by the Administration when it was brought within their cognizance. If the statements contained in the Application for Benefits were true when it was sent to the Veterans Administration, there was no misrepresentation made, and the Court committed prejudicial error in admitting such evidence.

VII.

The Circuit Court Has Decided an Important Question of Federal Law, Which Has Not, But Should Be, Passed Upon by This Court: Whether Under the Rules of Criminal Procedure for the District Courts of the United States, It Is Necessary for a Defendant Tendering An Instruction Properly Stating the Law on the Matter in Issue to Also Specifically Object to a Contrary Erroneous Instruction Given by the Court.

That the issue of good faith was involved in this case is clear. Petitioners solicited insurance for the A.O.U.W. under the instruction of the A.O.U.W. that it was perfectly proper to have the policies ante-dated. This was decided by the legal committee of the A.O.U.W. (R. 100-101). Petitioners requested the following instruction on good faith:

“If you believe from the evidence, or if you entertain a reasonable doubt upon the question that the defendants acted in good faith in the honest belief that they were doing what they had a legal right to do, you must acquit such defendants, even though the effect of what the defendants actually did was illegal.” (Requested Instruction No. 21 (R. 735).)

The Court refused this instruction and advised the jury as follows:

“Also good faith and honest belief is a defense, if you so find, after you have considered all the evidence. The charge or the violation that the defendants are charged with is found in the indictment, which you will have, and you must confine yourself to

a consideration of those charges and nothing else, because the charge is a conspiracy to attempt to defraud the United States." (R. 759, 760) (*Italics added*).

That this instruction of the Court is fundamentally wrong is clear. See *United States v. Murdock*, 290 U. S. 389; *McDonald v. United States*, 241 Fed. 793 (CCA-6); *Boatright v. United States*, 105 F. (2d) 737 (CCA-8); *Lambert v. United States*, 101 F. (2d) 960 (CCA-5).

The Circuit Court did not question the validity of the above authorities. But the Court said (R. 1050):

"But the instruction was not excepted to on that ground, no objection or criticism of that kind was brought to the attention of the trial court either in the form of exception or otherwise. Therefore, the question is not open to review. Rules of Criminal Procedure 30, 18 U.S.C.A. following Section 687."

Rule 51 of the Rules of Criminal Procedure must also be considered, in which it is provided that exceptions are unnecessary, and

"* * * it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him." (*Italics added*.)

Since a proper instruction was actually tendered and refused, it would be superfluous to object to the erroneous instruction. All that the rule requires is that the Court's attention must be directed to the error complained of. Furthermore, we maintain that the instruction given violates the basic principles of federal criminal jurisprudence in that the burden of proof is shifted to the accused.

It should also be noted that this instruction (R. 759-760) was a "last minute instruction" considered by this Court in *Bollenbach v. United States*, 326 U. S. 607. In that case, the Court pointed out:

"Particularly in a criminal trial, the judge's last

word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge." Page 612 of 326 U. S.

VIII.

The Circuit Court So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision in That the Circuit Court Found Petitioners Guilty on a Matter Which Was Not Submitted to the Jury.

We have already quoted the instruction of the District Court as to the practice of the A.O.U.W. in ante-dating policies (*supra*, pp. 12, 13). The trial court took the position that that procedure was proper, whereas the Circuit Court took an absolutely contrary position as appears from the opinion which was hereinbefore quoted. It must be assumed that the jury followed the instruction of the District Court. But the Circuit Court held that the practice of ante-dating the policies by the A.O.U.W. was in conflict with the statute, and that the policies ante-dated by the A.O.U.W. in conformity with its practice did not conform to the statute. The result is that the jury found these petitioners guilty on one theory and the Circuit Court of Appeals on another directly opposite. This Court speaking through Mr. Justice Cardozo in *Shepard v. United States*, 290 U. S. 96, 103, held that "a trial becomes unfair" if evidence is used in an appellate court to sustain a conviction on a different theory from that for which it was used in the trial court. We do not know and cannot tell upon what theory the jury found petitioners guilty, but it is certain that the jury could not have found them guilty because of ante-dating the policies. This was precluded by the instructions of the trial court. Therefore it follows that petitioners were convicted of some other offense, the nature of which is left open to conjecture. It has been held by this Court that where one is charged with one offense and convicted of another there is "sheer denial of due process." See *DeJonge v. State of Oregon*, 299 U. S. 353, 362.

It is respectfully prayed that this Honorable Court may issue a writ of certiorari ordering that this record be certified to this Court for its consideration and review.

Respectfully submitted,

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APPENDIX.

A tabulation of pertinent data relative to each of the so-called soldier-witnesses who testified for the prosecution. The dates are those appearing on the various documents.

CALVIN FREDERICK BETZ.

EXHIBIT	PAGE
6-b Application for insurance—May 1	769
Application for insurance received home of- fice—May 29	769
6-c Medical Examiner's Report—May 26	776
6-d Application for benefits—June 1	777
6-e Report by insurer states:	
Effective date of policy—May 1	
Contract made and first premium paid— May 1	781
Entered military service—June 1	778

WELLS MACGREGOR CORLISS.

8-b Application for insurance—June 3	785
Application for insurance received home of- fice—July 2	785
8-c Medical Examiner's Report—June 2	792
8-d Application for benefits—July 20	793
Report by insurer states:	799
Effective date of policy—June 1	797
Contract made and first premium paid— June 1	797
Entered military service—July 1	794

EDGAR DEAN BURROUGHS.

9-b Application for insurance—April 20	801
Application for insurance received home of- fice—May 5	801
9-c Medical Examiner's Report—April 25	808
9-d Application for benefits—Sept. 28	811
9-e Report by insurer states:	
Effective date of policy—June 1	812
Contract made and first premium paid— June 1	813
Entered military service—Sept. 15	810

EXHIBIT

PAGE

ALBERT GREEN.

17-b	Application for insurance—May 1	817
	Application for insurance received home of- fice—June 1	817
17-c	Medical Examiner's Report—May 28	824
17-d	Application for benefits—June 1	827
17-e	Report by insurer states:	
	Effective date of policy—May 1	828
	Contract made and first premium paid— May 1	829
	Entered military service—June 1	826

THEODORE JACKSON.

18-b	Application for insurance—Feb. 3	833
	Application for insurance received home of- fice—March 1	833
18-c	Medical Examiner's Report—Feb. 12	840
18-d	Application for benefits—July 9	843
	Report by insurer states:	
	Effective date of policy—Feb. 1	845
	Contract made and first premium paid— Feb. 1	846
	Entered military service—July 6	842

SYLVAN KAPLAN.

19-b	Application for insurance—April 25	849
	Application for insurance received home of- fice—May 6	849
19-c	Medical Examiner's Report—April 26	856
19-d	Application for benefits—July 27	859
	Report by insurer states:	
	Effective date of policy—May 1	860
	Contract made and first premium paid— May 1	861
	Entered military service—July 1	858

JOHN MICHAEL KARAMIGIOS.

20-b	Application for insurance—March 20	865
	Application for insurance received home of- fice—May 6	865

EXHIBIT

PAGE

20-c	Medical Examiner's Report—April 26	872
20-d	Application for benefits—July 6	875
	Report by insurer states:	
	Effective date of policy—May 1	876
	Contract made and first premium paid—	
	May 1	877
	Entered military service—July 1	874

ALBERT KORNAFEL

22-b	Application for insurance—May 1	881
	Application for insurance received home of-	
	fice—June 1	881
22-c	Medical Examiner's Report—May 28	888
22-d	Application for benefits—June 1	891
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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 507

SAMUEL LEONARD BERENBEIM, PETITIONER

v.

UNITED STATES OF AMERICA

No. 508

BEN SCHECTER, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE TENTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 1041-1050) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered November 5, 1947 (R. 1050-1051),

and a petition for rehearing was denied December 10, 1947 (R. 1059). The petition for a writ of certiorari was filed January 2, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

The principal questions presented are:

1. In determining whether an insurance contract was made more than 30 days before the insured entered the armed forces, whether the significant date is the date on which the application for insurance was made or the antedated date which appears on the face of the policy.

2. Whether the decision below is in conflict with *Terry v. United States*, 131 F. 2d 40 (C. C. A. 8).

3. Whether there is sufficient evidence showing that the defendants made false reports to the Veterans' Administration and conspired to defraud the United States.

4. Whether the instruction to the jury on the issue of good faith was incorrect, and, if so, whether the failure of petitioners to object to it on the ground now asserted forecloses them from attacking it here.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 27-30.

STATEMENT

On December 14, 1945, petitioners and the defendants Mankoff and Stoeffler were indicted in the United States District Court for the District of Colorado in one count charging that they unlawfully conspired to defraud the United States and to violate the false claims statute (Section 35 (A) of the Criminal Code, *infra*, pp. 29-30), in violation of Section 37 of the Criminal Code, *infra*, p. 30 (R. 14-53). The indictment alleged that the defendants agreed that they would, by the fraudulent means set forth, cause the Veterans' Administration to guarantee, pursuant to the provisions of the Soldiers' and Sailors' Civil Relief Act, the payment of premiums on certain life-insurance policies which the defendants caused to be issued to persons who had entered or were about to enter the armed forces; that the defendants falsely made it appear that the policies were in force on a premium-paying basis at the time of the application for benefits under the Act and that a premium had been paid not less than 30 days before the insured entered the armed forces; that if the true facts had been made known to the Veterans' Administration the premiums on the policies would not have been guaranteed; and that the conspiracy contemplated impairing and obstructing the Veterans' Administration in the exercise of its governmental function in administering the Soldiers' and Sailors' Civil Relief Act.

Having been convicted by a jury (R. 64), petitioner Berenbeim was sentenced to imprisonment for two years and to pay a fine of \$2,500 (R. 65). Petitioner Schechter was sentenced to imprisonment for two years and to pay a fine of \$1,000 (R. 65-66). Upon appeal to the Circuit Court of Appeals for the Tenth Circuit, the judgments were affirmed (R. 1050-1051).

The issues presented by the petition for a writ of certiorari are mainly questions of law which may be resolved without a detailed analysis of the evidence adduced at the trial. Accordingly, we shall confine the Statement to a generalized summary of the conspiracy, as shown principally by the Government's evidence, and a sample illustration in detail of how it operated in a specific instance.

Preliminarily, it may be noted that as one phase of its effort to relieve members of the armed forces from civil obligations until they were restored to civil life, the Congress authorized the Veterans' Administration to guarantee the payment of premiums on certain life insurance policies, not in excess of \$10,000. The guarantee provisions (*infra*, p. 27) were confined, *inter alia*, to a contract of insurance (1) "which [was] in force on a premium-paying basis at the time" the application for benefits under the Act was made, and (2) "which was made and a premium paid thereon * * * not less than thirty days before the date the insured entered into the mili-

tary service" (sec. 400 (a)). Consistently with sections 402 and 407 of the Act, the Veterans' Administration prepared forms for use in applying for benefits under the Act.¹ Form 380 (8 F. R. 2760) was required to be submitted by the insured, and it required information which would enable the Veterans' Administration to determine whether the insured was eligible for the benefits provided by the Act. In practice, Form 380 was submitted by the member of the armed forces to the Veterans' Administration and a copy was forwarded to the insurer. Upon receipt of such a form, the insurer submitted Form 381 (8 F. R. 2761) to the Veterans' Administration, which furnished that agency with pertinent information concerning the policy. If, upon consideration of the information shown by the two forms, the Veterans' Administration determined that the policy was within the terms of the statute, the Administration sent its Notice of Approval to the insurer and insured, and for the duration of the insured's military service and two years thereafter the Government guaranteed the payment of premiums.

Petitioner Berenbeim, a member of the bar of Colorado (R. 491), was the "State Manager" for the Ancient Order of United Workmen of Kansas, a fraternal benefit association, in the sale of insurance in Colorado (see R. 79-87). Petitioner

¹ Regulations also were promulgated (7 F. R. 10232-10235).

Schechter and defendant Mankoff were subagents who sold insurance under Berenbeim's direction (R. 496-498, 407). Defendant Stoeffler worked for Schechter in the sale of such insurance (R. 413, 565). On all insurance which was sold, Berenbeim received a commission of $82\frac{1}{2}\%$ of the first year's premium and a diminishing rate for premiums paid in the following years (R. 81, 406).² He paid a commission of 70% of the first year's premium to Schechter and Mankoff for policies which they sold (R. 407, 420, 623). Schechter had a special arrangement with Stoeffler (R. 714, 413).

The ultimate objective of the conspiracy was to secure the Veterans' Administration guarantee of premiums on policies of insurance which were sold by petitioners and their codefendants to young men immediately before they entered the armed forces. In operation the scheme worked as follows:

Mankoff, Stoeffler, and Schechter, the salesmen, sought out young men who had been called for military service and who were on brief furloughs before reporting for active duty. They represented to these young men that they could obtain insurance at no cost to themselves; that the premiums would be guaranteed by the Government; that two years after they were released from mili-

² These terms were later modified to pay Berenbeim an additional \$5 for each \$1,000 of insurance which was sold (R. 84-85).

tary service, they could elect whether to keep the policy and commence paying the premiums; and that in any event they would be under no obligation to pay the premiums which accrued while the guarantee was in effect (see, e. g., R. 197-198, 210-212, 230-231, 246-247). Whenever a prospect agreed to the proposition, the agent would have him sign three different blank forms, an application for an insurance policy, a medical report and an application to the Veterans' Administration to bring the policy under the guarantee provisions of the Act (see e. g., R. 199-201, 212-213, 232-233, 247-248). In addition, the prospect was given a form which he was to forward to the agent as soon as he reported for active duty, showing his serial number, rank, organization, identification number, branch of service and the date on which he entered active duty (see, e. g., R. 201, 212, 258). The agents secured the routine information from the applicant as to his birthdate, beneficiary, etc. (R. 231, 252, 275). The applicant never paid any premiums (see, e. g., R. 214-215, 233, 247, 279). Instead, the agent paid the monthly premiums until the guarantee was obtained (R. 582, 693, 707, 720), after which no further premiums were paid.

The agent filled in the application for insurance, which the applicant had signed in blank, in each case requesting a \$10,000 policy (the maximum for which a guarantee was available under the

Act), and in each case dating the application as of the first day of the month regardless of the date on which it was actually made (see R. 768-769, 784-785, 816-817), so as to show that the policy had been in existence more than 30 days before the insured entered the armed forces (see R. 684). The medical form was completed by the agent and a doctor who worked with him, but who did not see the applicants (R. 567-568, 592; see also, e. g., R. 198, 785-792, 212, 849-857). The application and medical form were then submitted to Berenbeim, who in turn forwarded them to the home office of the company (R. 498). In due course the policies issued and were forwarded to Berenbeim (R. 135, 498). Except in a few cases, the policies were not delivered to the persons who had applied for them (see, e. g., R. 201, 234, 259, 279).

In the meantime, the insured had reported for active duty and had returned to the agent the form which was previously given him, and the agent had filled in the Veterans' Administration Form 380, which the insured had signed in blank (R. 420, 585, 604, 606). The form, which was an application for benefits under the Act, was forwarded by Berenbeim (R. 410, 644) to the Veterans' Administration, a copy being sent to the insurer. In filling in the form, the agent falsely stated that a premium had been paid more than 30 days before the insured entered the

armed forces (see, *supra*, p. 7); that the policy was in the possession of the beneficiary named in it (see, *supra*, p. 8);³ and that the form was signed by the insured on a given date at Denver, Colorado—at a time when the insured was present some other place on active duty in the armed forces (see, e. g., R. 202, 213, 235, 248, 306, 321).

On the basis of its records, the insurer submitted Form 381 to the Veterans' Administration showing that the contract was made and the first premium was paid more than 30 days prior to the insured's entry into the armed forces (R. 128, 137; see R. 940-942, 957-960). As soon as the Veterans' Administration approved the application and guaranteed the premiums, the insurer credited Berenbeim with his commission on the first year's premium and he, in turn, paid Mankoff and Schechter their commissions (R. 409-410, 162-163). While the premiums, and therefore the commissions, varied, Mankoff and Schechter received over \$300 in first-year commissions on each policy they sold and Berenbeim received over \$150 on each one (see R. 453-457). The extent of the agents' sales is illustrated by Mankoff's statement to an F. B. I. agent that during the month of May 1943, he sold 25 policies (R. 424), thus earning commissions of over \$7,500 for the month.

³ Mankoff testified (R. 628) that it was his practice to state that the policy had been delivered to the insured's beneficiary, even though it had not been so delivered.

The Government's witnesses included sixteen young men who had been "sold" insurance in the manner contemplated by the conspirators. While there are some factual variations, the significant features of the conspiracy manifested themselves in each instance. Thus, for example, the witness Pepper testified that he reported for active military duty in the Army on August 26, 1943 (R. 396). About a month before this, while he was waiting to be called to active duty, petitioner Schechter undertook to "sell" him a \$10,000 insurance policy (R. 396-397). Pepper testified (R. 397)—

* * * the insurance was explained to me as a policy that contained no war clause, and that I could take out a \$10,000 protection to my beneficiary, and it would have no cost to myself, and then in the event that I wanted to continue it when I got out of service, I would have two years to either convert the policy or make up my mind about it, and in the event I wanted to drop the policy I could do so with no cost to myself.

Pepper had some doubts "because I couldn't figure out how you could possibly have insurance without paying for it," but Schechter told Pepper "to leave it to him, because I wouldn't be liable for any premiums" (R. 397). On the basis of these representations, Pepper signed an application for a \$10,000 policy and furnished Schechter with the requisite information concern-

ing his birthdate, beneficiary, etc. (R. 398, 912-913). The application form stated that the insurance was to be effective as of June 1, 1943, and it recited that the monthly premium of \$51.20 was collected and remitted (R. 913). The form also provided that the applicant agreed that "the policy to be issued hereon shall have no binding force until actually delivered to me, and the first premium paid and accepted by the Order" (see R. 913, 769). At the same time Pepper signed (R. 399) a medical examiner's report (R. 913-921) and Veterans' Administration Form 380 (R. 921-923), both of which were filled out at a later time by Schechter and a doctor who cooperated with him (see R. 567-568, 585, 592-594). Contrary to the statement in the application form, Pepper did not pay any sum of money to Schechter (R. 398). Pepper testified further that he had not been physically examined by the doctor who certified on the medical report that such an examination had been made (R. 398-399), that when he signed the blank form he did not know what kind of insurance he was to get or the amount of the premiums (R. 399), and that he never did receive a policy of insurance (R. 399).

While there was no specific testimony as to the handling of the various forms by Schechter, it appears that they were treated in the usual manner. Schechter appears to have filled in the ap-

plication form, a "Dr. Wilkoff" signed the medical report (R. 920), and these documents were then forwarded by Berenbeim to the insurer, where they were received on June 30, 1943 (see R. 913, 921). A policy was issued by the company and forwarded to Berenbeim on July 7, 1943 (see R. 921).

On August 26, 1943, Pepper reported for active military duty (R. 396). Thereafter, Schechter filled in the Form 380 which Pepper previously had signed in blank and copies of the form were sent to the Veterans' Administration and the insurer (see R. 927, 921). In the form, which was submitted under Pepper's signature (see R. 923), Schechter stated, *inter alia*, that the last premium paid on the policy was paid July 1, 1943; that the policy was in the possession of "Joseph Pepper, 832 Garfield St., Denver, Colo."⁴; and that the form was signed by Pepper on August 29, 1943, at Denver, Colorado (R. 922-923). In truth, Pepper never had paid a premium on the policy (R. 398); he never saw the policy which was issued for him by the insurer (R. 399); and he did not sign the Form 380 on August 29, 1943, at Denver, Colorado, for at that time he was on active military duty at Fort Logan (R. 399).

On September 2, 1943, the insurer filed Form 381 with the Veterans' Administration (R. 924-927), in which it was stated, *inter alia*, that the

⁴ See footnote 3, *supra*, p. 9.

policy was effective June 1, 1943; that a premium was paid on the policy on July 1, 1943; that the insurance contract was made and the first premium paid on June 1, 1943; and that the policy had been delivered to Joseph Pepper, the beneficiary. On December 9, 1943, the insurer received a Notice of Approval from the Veterans' Administration guaranteeing the premiums (R. 924).

ARGUMENT

It is manifest from the abundant evidence adduced at the trial that everyone with whom the defendants dealt was deceived, and this, it is plain, was the result contemplated by the conspiracy. The young men who "bought" insurance immediately prior to entering active military duty did so because they were led to believe that they were getting valuable protection for nothing. The insurer was induced to issue policies to the various applicants on the basis of false medical reports and apparently without knowledge that the applicants had been deceived into signing the necessary papers. And the Veterans' Administration was induced, by means of the defendants' deception, into guaranteeing the premiums on contracts of insurance which had not been made more than 30 days before the date on which the insured entered the military service and on which no premium had been paid by the insured, as the statute requires. The fraud on the insured and

the insurer have significance in the case because they were the means by which the ultimate objective of the conspiracy—the Government guarantee of the premiums—was attained. But at this juncture of the litigation it is unnecessary to dwell on anything more than the plain fraud which the defendants perpetrated on the Veterans' Administration. We turn to a brief seriatim consideration of the contentions which petitioners urge.

1. The Soldiers' and Sailors' Civil Relief Act requires as a condition to eligibility for Government guarantee of premiums that the contract of insurance shall have been made more than thirty days before the insured went on active military duty. To satisfy this condition, the conspirators caused the insurance to be back-dated. Thus, for example, in the case of the witness Betz, the testimony showed that he signed the application form on May 26 (R. 322) or May 28 (R. 320) and entered on active military duty on June 1 (R. 319). The application form requested that the policy be issued as of May 1, 1943 (R. 768-769) and the policy was so issued (see R. 380). The Veterans' Administration was thus informed that the policy was more than thirty days old when Betz entered active military service.

Petitioners point to evidence showing that it was the accepted practice of the insurer to date its policies as of either the first day of the month in which the application was made or of the fol-

lowing month (R. 100, 123, 126, 167) and they urge (Pet. 11-14) that there was nothing wrong in what they did. Indeed, they suggest that the question whether the date on the application or the date on the policy controls is a certiorari question.

It seems plain to us that the thirty-day provision in the statute was designed specifically for the purpose of eliminating from the guarantee protection afforded by the act, policies which were sold, as here, immediately preceding the insured's entry into active military service. Otherwise the thirty-day limitation has little, if any, meaning. But there is no occasion in these cases to reach that question. For the jury was instructed, at petitioners' request (R. 732-733), that the effective date of the insurance for guarantee purposes was the date on the face of the policy (R. 753-754). By this instruction the trial judge, in effect, eliminated from the case the issue whether the policies were less than thirty days old, for in each case the date on the policy was more than thirty days before the insured went on active military duty. In these circumstances, there can be no issue in this Court as to the propriety of dating back the policies or as to which date is controlling. Petitioners prevailed on this issue of law in the district court and there is thus nothing of the issue left for appellate review.

2. For the same reason, petitioners' second contention (Pet. 14-15) is without merit. Peti-

tioners' argument concerning the meaning of "date" is beside the point. For the meaning for which they contend was the one which the district court adopted. Nothing in the opinion of the circuit court of appeals suggests that, in reviewing the trial proceedings, the appellate court rejected the instruction which petitioners asked for and got in the trial court (see *infra*, pp. 24-36).

3. Petitioners' reliance (Pet. 15-16) on *Terry v. United States*, 131 F. 2d 40 (C. C. A. 8), as being in conflict with the decision below is misplaced. That was a case in which false statements were made to a local lending institution, which later obtained credit insurance from the Federal Housing Administration, and the court held that the defendants' false statements did not constitute a violation of the false claims statute. But the court carefully distinguished cases like *United States v. Gilliland*, 312 U. S. 86, where, as the court said (131 F. 2d at 45), "the defendants were shown to have knowingly made false statements in reports to an agency of the government in respect to a matter within its jurisdiction and the point involved in this case was not involved."

In these cases the defendants caused false reports to be made to the Veterans' Administration. They were not prosecuted for making false statements to the insurer or to any other outsider. The evidence summarized in the Statement shows, and petitioners do not deny, that the defendants caused the applicants to sign the Veterans' Ad-

ministration Forms 380 in blank. The defendants subsequently filled them in falsely stating that the insured had paid the last premium on the policy, that the policy had been delivered to the insured's beneficiary, and that the information was submitted by the insured who signed the statement at a given time and place. Not only did the defendants give false answers on the Form 380, but it was they who forwarded the forms to the Veterans' Administration. And thus in a real sense they made false reports to the Veterans' Administration, which, it is undisputed, had jurisdiction to administer the Soldiers' and Sailors' Civil Relief Act. The basic difficulty with petitioners' argument in this respect is that they have conveniently overlooked Form 380, without which there would not have been guaranteed premiums. In our view, submission of the Forms 380 to the Veterans' Administration was a vital step in the successful execution of the conspirators' plan. If the questions in the forms had been truthfully answered by the insured persons, there can be little question that the guarantees would not have been forthcoming.

4. In urging (Pet. 16-19) that "Any misrepresentations or false claims made to the government" were made by the insurer in the Forms 381 which the insurer filed with the Veterans' Administration, and not by them, petitioners again conveniently disregard the Forms 380 which contained false information and which they filed

with the Veterans' Administration, although the forms appeared to have been filed by the insured persons. Far from having been convicted for someone else's wrongdoing, petitioners were convicted because of what they themselves did.

5. The contention (Pet. 19-26) that petitioners' only fraud was against the insured persons and the insurer and that evidence of this fraud was the basis for their convictions disregards the fact that there would have been no incentive for the frauds on the individuals and the insurer except as a means of obtaining the issuance of insurance policies, the premiums of which would be guaranteed by the Government. Without the guarantees, petitioners obviously would not have "sold" large insurance policies to young men who were entering active military duty, and they certainly would not have paid the initial premiums on the policies, as they did. These were but preliminary steps to the obtaining of Government guarantees for the premiums and it was the fraud involved in obtaining these guarantees for which petitioners were convicted. Instead of showing fraud against individuals only, the evidence convincingly demonstrated that these were incidental frauds and that the success of the conspiracy depended upon the final step, the securing of the guarantees by deceit.

6. The fundamental assumption for petitioners' sixth contention (Pet. 26-29) that the defendants did not make any misrepresentations to the Gov-

ernment is, as we have shown, unsound. Viewing the answers contained on the Forms 380 which petitioners submitted to the Veterans' Administration "in the light of the facts existing when said document was brought to the attention of the Veterans Administration for official action" (Pet. 28), it is plain that the answers stating that the insured had paid the last premium on the policy was untrue, as were the answers stating that each policy was in the possession of the person named as beneficiary. And, finally, the defendants made it appear that the persons who signed the forms undertook the obligations contained in it (see, e. g., R. 922). But the evidence shows that the young men merely signed blank forms, not knowing their contents, and that they had no intention of undertaking to reimburse the Government for any premiums which it was required to pay. It is evident that the Veterans' Administration was misled, by the Forms 380 which were submitted, into guaranteeing the premiums on the policies, and it is equally evident that the defendants did the misleading.

7. At the close of the evidence petitioners submitted to the court 28 requested instructions. The trial judge went over each with counsel and indicated which he would give and which would be refused (see R. 727-741). The court declined Defendants' Requested Instruction No. 21 (R. 735), which read:

If you believe from the evidence, or if you entertain a reasonable doubt upon the question that the defendants acted in good faith in the honest belief that they were doing what they had a legal right to do, you must acquit such defendants, even though the effect of what the defendants actually did was illegal.

Instead the court instructed the jury that to convict they must find that the defendants had a corrupt intent to defraud the United States. The court stated (R. 752):

Now, intent, ladies and gentlemen, is an essential element of this crime, and you must find that any defendant had the necessary intent to violate the law. In order to find a defendant, or any of them, guilty, the jury must find beyond a reasonable doubt that they conspired with intent to defraud and with knowledge of the unlawful nature of their acts and intended to become a party to such conspiracy.

Now, intent, ladies and gentlemen, is something that you cannot give any direct evidence about, so you may judge whether a man has an intent to do a certain act by his conduct and by the necessary consequences that flow from his acts in dealing with his fellow men. If you believe that any one of these defendants intended to do what he did with the intent to defraud the Government of the United States, then that is sufficient to prove that he intended that act and would justify a verdict of guilty at your hands.

And a few moments later the court reiterated the instructions on intent (R. 754), as follows:

Intent is an essential element of the crime charged by the indictment. In order for the jury to find the defendants or any of them guilty, the jury must find that the defendants conspired with an intent to defraud and with knowledge that the claims or statements, if any, presented to the United States were false, fictitious or fraudulent. If the jury finds that the defendants had no intent to defraud the United States and did not conspire to knowingly and wilfully present a false claim or statement to the United States, then the defendants are entitled to a verdict of acquittal.

One of the essential elements of this case, as I have told you, is intent. The charge is that the defendants knowingly and wilfully conspired with each other to do the acts complained of, but before there can be any conviction of any defendant in this case, you must find from the evidence beyond a reasonable doubt that such defendant or defendants had a corrupt intent and acted with full knowledge that what they did was done for the purpose of defrauding the United States.

At the close of the instructions, the court invited any further requested instructions or exceptions (R. 756). Petitioners noted some exceptions (R. 756-757) and the Government then suggested certain additional instructions (R. 757-758), in-

cluding an instruction "that good faith and honest belief is a defense, but they have to find that from all the evidence in the case." Petitioners' counsel raised additional matters in regard to the instruction, but offered no comment on the instructions on good faith which the Government suggested (see R. 758-759).

The court then further instructed the jury and included the following statement (R. 759-760):

Also, good faith and honest belief is a defense, if you so find, after you have considered all the evidence. The charge or the violation that the defendants are charged with is found in the indictment, which you will have, and you must confine yourselves to a consideration of those charges and nothing else, because the charge is a conspiracy to attempt to defraud the United States.

Immediately upon the conclusion of the instruction on good faith, the trial judge invited exceptions and petitioners' counsel excepted to the instruction on good faith in the following terms (R. 760):

[The COURT.] Are there any other exceptions?

Mr. ROBINSON. To the last one that you mentioned, where you state again that the charge was an intent to defraud the United States, without restricting or limiting it to the material facts contained in the indictment.

Petitioners now contend that the instruction was erroneous on another ground, "in that the burden of proof is shifted to the accused" (Pet. 30). But this ground was not asserted in the trial court and, as the court below noted (R. 1050), it therefore is not now open to petitioners. Rule 30 of the Federal Rules of Criminal Procedure specifically provides that—

* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

As the recital of the proceedings shows, petitioners had an opportunity to object to the terms of the instruction both when it was proposed by the Government and when it was given by the trial judge. In both instances they raised other objections, but not the one on which they now rely.

It is no answer to suggest, as petitioners do, that they had made their position known to the court three days earlier when they tendered their Requested Instruction No. 21. For in the light of the iteration and reiteration of the instructions on corrupt intent and the giving of the instruction on good faith which the Government requested, it was reasonable for the trial judge to assume that petitioners were satisfied with the instructions as given. This is particularly so, because petitioners were given ample opportunity to

except to the instruction and they did not do so on the ground on which they now rely. A defendant may not excuse his acquiescence in an instruction by showing that at an earlier stage in the proceedings he had taken a different position. Particularly where the objection is as technical as that which petitioners now urge, it should have been distinctly stated to the trial judge, as Rule 30 requires.

In view of the overwhelming strength of the evidence of guilt and in view of the court's emphasis on the element of corrupt intent as an ingredient of the offense, it is difficult to believe that the instruction to which petitioners now object played any substantial part in tipping the scales against them.

8. In their final contentions (Pet. 31-32) petitioners return to the question of back-dating the insurance policies. As has been shown, *supra*, p. 15, the trial court instructed the jury that the date on the policy controlled and that petitioners' practice in this respect was unobjectionable. Petitioners now urge that the circuit court of appeals reached a contrary conclusion and that their convictions were affirmed on a different theory of the case than was submitted to the jury. Reference to the opinion of the court below demonstrates that petitioners are mistaken.

After summarizing the evidence (R. 1043-1046) and setting forth the relevant statutory provisions (R. 1041-1043, 1046), the circuit court

of appeals characterized the conspiracy as follows (R. 1047):

* * * The scheme apparently designed, patterned, and carried out with deliberate care involved from the very outset much more than merely dating policies back to the first day of the current month in which the applications were submitted and the paying of the first premium on them. It was saturated with falsity and concealment. The prospects were told in substance that they could obtain the insurance coverage without cost or liability. The obligation to reimburse the government for premiums paid was carefully concealed. The applications for insurance were held until the strategic time arrived and were then filled out. The reports of medical examination were faked. Certain material information given in the applications for benefits under the Act was misleading and deceptive. And as contemplated by the defendants, the reports of the insurance company contained statements or representations similar to the misleading and deceptive representations contained in the applications for benefits under the Act in respect of the time the insurance had been in effect and a premium paid thereon. All of that was done for the purpose of bringing about the guarantee of the premiums, after which the defendants would reap their financial reward. An agreement to enter into such a concert of action for that

ultimate end attended by one or more overt acts by one or more of the parties constitutes a conspiracy to defraud the United States, in violation of section 37, *supra*.

In the light of these words, it can hardly be seriously contended that petitioners' convictions were affirmed because the circuit court of appeals thought it was wrong for them to date back the policies which they sold. At no place in the opinion did the appellate court express disapproval of the theory of the case in the trial court. Indeed, it reiterated the theory of the trial judge (cf. R. 490-491, 726-727 with R. 1046-1047). The theory of the case has been the same in the district court and in the circuit court of appeals.

CONCLUSION

On the record, the guilt of petitioners is convincingly established. The contentions which petitioners urge fail to demonstrate in any respect that they were not fairly tried and convicted. We therefore respectfully submit that the petition for writs of certiorari should be denied.

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JANUARY 1948.

APPENDIX

1. The Soldiers' and Sailors' Civil Relief Act, as amended, 56 Stat. 773 (50 U. S. C. App., Supp. V, 540-548) provides in pertinent part:

SEC. 400. As used in this article—

(a) The term "policy" shall include any contract of life insurance or policy on a life, endowment, or term plan, including any benefit in the nature of life insurance arising out of membership in any fraternal or beneficial association, which does not provide for the payment of any sum less than the face value thereof or for the payment of an additional amount as premiums if the insured engages in the military service of the United States as defined in section 101 of article I of this Act or which does not contain any limitation or restriction upon coverage relating to engagement in or pursuit of certain types of activities which a person might be required to engage in by virtue of his being in such military service, and (1) which is in force on a premium-paying basis at the time of application for benefits hereunder, and (2) which was made and a premium paid thereon before the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 or not less than thirty days before the date the insured entered into the military service. The provisions of this Act shall not be applicable to policies or contracts of life insurance issued under the War Risk Insurance Act, as amended, the World War Veterans' Act, as amended, or the National Service Life Insurance Act of 1940, as amended. * * *

SEC. 401. The benefits and privileges of this article shall apply to any insured, when such insured, or a person designated by him, or, in case the insured is outside

the continental United States (excluding Alaska and the Panama Canal Zone), a beneficiary, shall make written application for protection under this article, unless the Administrator of Veterans' Affairs in passing upon such application as provided in this article shall find that the policy is not entitled to protection hereunder. The Veterans' Administration shall give notice to the military and naval authorities of the provisions of this article, and shall include in such notice an explanation of such provisions for the information of those desiring to make application for the benefits thereof. The original of such application shall be sent by the insured to the insurer, and a copy thereof to the Veterans' Administration. The total amount of insurance on the life of one insured under policies protected by the provisions of this article shall not exceed \$10,000. If an insured makes application for protection of policies on his life totaling insurance in excess of \$10,000, the Administrator is authorized to have the amount of insurance divided into two or more policies so that the protection of this article may be extended to include policies for a total amount of insurance not to exceed \$10,000, and a policy which affords the best security to the Government shall be given preference.

SEC. 402. Any writing signed by the insured and identifying the policy and the insurer, and agreeing that his rights under the policy are subject to and modified by the provisions of this article, shall be sufficient as an application for the benefits of this article, but the Veterans' Administration may require the insured and insurer to execute such other forms as may be deemed advisable. Upon receipt of the application of the insured the insurer shall

furnish such report to the Veterans' Administration concerning the policy as shall be prescribed by regulations. The insured who has made application for protection under this article and the insurer shall be deemed to have agreed to such modification of the policy as may be required to give this article full force and effect with respect to such policy.

SEC. 403. The Administrator of Veterans' Affairs shall find whether the policy is entitled to protection under this article and shall notify the insured and the insurer of such finding. Any policy found by the Administrator of Veterans' Affairs to be entitled to protection under this article shall not, subsequent to date of application, and during the period of military service of the insured or during two years after the expiration of such service, lapse or otherwise terminate or be forfeited for the nonpayment of a premium becoming due and payable, or the nonpayment of any indebtedness or interest.

SEC. 407. The Administrator of Veterans' Affairs is hereby authorized and directed to provide by regulations for such rules of procedure and forms as he may deem advisable in carrying out the provisions of this article. The findings of fact and conclusions of law made by the Administrator of Veterans' Affairs in administering the provisions of this article shall be final, and shall not be subject to review by any other official or agency of the Government. The Administrator of Veterans' Affairs shall report annually to the Congress on the administration of this article.

2. Section 35 (A) of the Criminal Code (18 U. S. C. 80) provides:

Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

3. Section 37 of the Criminal Code (18 U. S. C. 88) provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both.



IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1947.

Nos. 507 and 508.

SAMUEL LEONARD BERENBEIM, PETITIONER,

v.

UNITED STATES OF AMERICA.

BEN SCHECHTER, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

REPLY BRIEF OF PETITIONERS.

The government correctly states on page 15 of its brief that in the trial court the jury was instructed that the effective date of the insurance for guarantee purposes was the date on the face of the policy. But the Circuit Court held to the contrary. (See page 13 of our original brief.) So as we pointed out in our original brief the conviction was affirmed on a different legal theory from that submitted to the jury.

Apparently, the government now for the first time in the course of this litigation appreciates that petitioners are not responsible for the statements made in the insurer's report, form 381,—this for the reason that this report was made by the A. O. U. W. and petitioners had nothing to do with it. (Pages 16-18 of our opening brief).

In both the District Court and in the Circuit Court it was said that the insurer relied on statements made by petitioners in form 380. This we have shown was not the case. Now the government says petitioners are conveniently trying to disregard form 380, i. e., the application for benefits. The point the government overlooks is that form 381, a document for which we are in no wise responsible was offered against us and considered heavily against us in both the trial and circuit courts. We dispute that there were any false statements in form 380. The government's theory in the trial court was that form 380 gave false information because at the time that it was actually signed the soldier had not been inducted, but the undisputed fact is that *at the time form 380 was sent to the Veterans Administration* and brought within the cognizance of the Veterans Administration, the soldier was actually inducted.

It is established by abundant authority that the truth of a written statement must be determined in the light of the facts that existed when the statement is submitted for consideration. Up to that time it could have no vitality. (See original brief, pages 28-29).

The government recognizes that it is necessary to have some false statement for which petitioners are responsible upon which to hang its case, and accordingly on pages 8 and 9 of its brief says:

“In filling in the form the agent falsely stated that a premium had been paid more than thirty days before the insured entered the armed forces * * *

This is not supported by the record. Form 380 called for the due date of the last premium paid (see, e. g., R. 938). Petitioners filled this in by inserting the first day of the month, which was the due date for all premiums according to the rules of the A. O. U. W. This was pursu-

ant to the rules of the A. O. U. W. and not because of any fraud on the part of petitioners.

The premium date was invariably fixed by the A. O. U. W. as the first day of the month (see tabulation, pp. 33-37 of opening brief). As the Solicitor General states, the District Court held that this antedating did not make the policy ineligible for government guarantee. The Circuit Court of Appeals departed from this and the Solicitor General does likewise. The statement on page 8 of the government's brief that in each case petitioners dated "*the application* as of the first day of the month * * *" is contradicted by the Record (see tabulation, pp. 33-37 of our opening brief).

Nor does the evidence support the contention of the government that form 380 was false because of the statement that the policy was in the possession of the beneficiary. The most that can be said is that several of the veterans testified that their parents had mentioned that they had not received the policy, but this was merely hearsay (e. g. R. 234). Others testified they had received the policies (R. 249, 325, 654, 658, 659 and 663). Furthermore, the trial court instructed the jury and properly so that whether the policy was in possession of the beneficiary was immaterial. The controlling thing is that the A. O. U. W. in Form 381 with respect to all of these policies stated that they were in force and that the premiums had been paid and gave the dates on which the premiums had been paid.

The records of the A. O. U. W. show that all premiums had been paid and the date on which each premium had been paid was at least thirty days prior to induction (pp. 33-37, opening brief).

The government on page 24 of its brief urges that our objection to the instruction which placed the burden of proof upon petitioners as to good faith is technical. We respectfully disagree and suggest that it is a basic principle of American criminal jurisprudence. It is the important distinction between the jurisprudence of this country and that of continental Europe. Even if the other instructions of the Court did properly place the burden of proof where

it belonged, the challenged instruction manifestly did not. Prejudice that inheres in a charge that is definitely erroneous upon an important principle of law is not neutralized by a general instruction correctly stating the law. As pointed out in our opening brief this instruction was given separately from the previous instructions. It was the last word of the trial judge, and would have more influence with the jury than the previous general instructions (*Bollenback v. United States*, 362 U. S. 607).

Respectfully submitted,

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